## Amalan Tepat Sdn Bhd v Panflex Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 02-(I)-20 OF 2010(J)
HASHIM YUSOFF, MOHD GHAZALI AND AHMAD MAAROP FCJJ
16 JANUARY 2012

*Civil Procedure — Jurisdiction — Federal Court — Power of review Application to Federal Court to review its own decision — Whether court had power to review its own decision — Rules of the Federal Court 1995 r 137 — Courts of Judicature Act 1964*

*Words and Phrases — 'Review' — Meaning of*

In the originating action in the High Court, Panflex Sdn Bhd ('the applicant') as the plaintiff had commenced an action against Gymtech Development Sdn Bhd ('Gymtech') as the first defendant, which had since been wound up, and Amalan Tepat Sdn Bhd ('the respondent') as the second defendant. In this action the applicant had prayed, inter alia, for a declaration that the supplementary agreement that it had entered into with the respondent and Gymtech had been validly cancelled and terminated, for the refund of the purchase price or as an alternative special loss and specific damages, interest and costs. The respondent failed to file its defence within the time prescribed but later filed an application for an extension of time to file the defence. In the meantime, the applicant had filed an application to enter judgment in default of defence. When both applications came up for hearing, the court dismissed the respondent's application for an extension of time to file its defence but allowed the applicant to enter judgment in default of defence. The respondent appealed to the High Court, which dismissed the appeal. The respondent's appeal to the Court of Appeal was also dismissed. The respondent then obtained the leave of this court to appeal against the decision of the Court of Appeal. At the close of the hearing of the appeal, this court set aside the judgment in default and ordered the case to be remitted to the Muar High Court for full trial. The applicant has now filed the instant application under r 137 of the Rules of the Federal Court 1995 ('the Rules') to move this court to review its own decision for the purpose of setting it aside so that the appeal could be reheard before a differently constituted panel of this court. The sole issue for determination in this application is whether this court had the power to review its own decision.

**Held**, dismissing the application with costs fixed at RM30,000:

(1) The word 'review' in legal parlance connotes a judicial re-examination of

the case. According to the *Concise Oxford Dictionary* (9th Ed), the word 'review' means 'revision' or 'reconsideration' (see para 14).

(2) There was no provision either in the Constitution or the Courts of Judicature Act 1964 ('CJA') which conferred on this court the substantive power to review its own decision. Upon taking the words of the Constitution and the CJA in its 'natural and obvious sense' it was found that this court was not at liberty to review, re-examine, reconsider or rehear an appeal it had already heard and disposed of. Neither could this court entertain applications to review on the grounds that one of the parties in the case conceived itself to be aggrieved by the decision. This court is the 'apex court' or the highest court within the hierarchy of the legal jurisdiction in this country and thus the decisions of this court are not subject to further review (see paras 25–27, 31, 40).

(3) The present application for this court to review its own decision was clearly an instance of an abuse of the process of the court. Rule 137 of the Rules could not be utilised by this court to review or rehear and determine appeals from a decision given in an appeal it had already disposed of (see paras 28, 30–34, 39).

**[Bahasa Malaysia summary**

Dalam tindakan pemula di Mahkamah Tinggi, Panflex Sdn Bhd ('pemohon') sebagai plaintif telah memulakan tindakan terhadap Gymtech Development Sdn Bhd ('Gymtech') sebagai defendan pertama, yang telah digulung, dan Amalan Tepat Sdn Bhd ('responden') sebagai defendan kedua. Dalam tindakan ini pemohon telah memohon, antara lain, untuk perisytiharan bahawa perjanjian tambahan yang dimasukinya dengan responden dan Gymtech telah secara sah dibatalkan dan ditamatkan, untuk bayaran balik harga belian atau sebagai alternative kerugian khas dan ganti rugi spesifik, faedah dan kos. Responden gagal untuk emmfailkan pembelaannya dalam masa yang ditetapkan tetapi kemudiannya memfailkan permohonan untuk pelanjutan masa untuk memfailkan pembelaan. Sementara itu, pemohon telah memfailkan permohonan untuk memasuki penghakiman ingkar pembelaan. Apabila kedua-dua permohonan didengar, mahkamah menolak permohonan responden untuk pelanjutan masa untuk memfailkan pembelaannya tetapi membenarkan pemohon untuk memasuki penghakiman ingkar pembelaan. Responden merayu kepada Mahkamah Tinggi, yang mana menolak rayuan tersebut. Rayuan responden ke Mahkamah Rayuan juga ditolak. Responden kemudiannya mendapatkan izin mahkamah ini untuk merayu terhadap keputusan Mahkamah Rayuan. Pada akhir pendengaran rayuan tersebut, mahkamah ini mengenepikan penghakiman ingkar dan memerintahkan kes di remit ke Mahkamah Tinggi Muar untuk perbicaraan penuh. Pemohon sekarang ini memfailkan permohonan ini di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('Kaedah-Kaedah') untuk memohon mahkamah ini menyemak kembali keputusannya untuk tujuan

mengenepikannya supaya rayuan boleh didengar semula di hadapan panel baru mahkamah ini. Satu-satunya isu untuk penentuan dalam permohonan ini adalah sama ada mahkamah ini mempunyai kuasa untuk menyemak keputusannya sendiri.

**Diputuskan**, menolak permohonan dengan kos ditetapkan pada RM30,000:

(1) Perkataan 'review' dalam bahasa undang-undang membawa maksud pemeriksan semula kehakiman kes. Mengikut *Concise Oxford Dictionary* (9th Ed), perkataan 'review' bermaksud 'revision' atau 'reconsideration' (lihat perenggan 14).

(2) Tidak dapat peruntukan sama ada di dalam Perlembagaan atau Akta Mahkamah Kehakiman 1964 ('AMK') yang memberikan mahkamah ini kuasa substantif untuk menyemak semula keputusannya. Selepas mengambilkira perkataan-perkataan Perlembagaan dan AMK dalam maksud 'natural and obvious sense' ia didapati bahawa mahkamah ini tidak bebas untuk menyemak, memeriksa semula atau mendengar semula rayuan yang telah didengarnya dan diputuskan. Mahkamah ini juga tidak boleh mendengar permohonan-permohonan untuk menyemak atas alasan bahawa salah satu pihak dalam kes ini memikirkan ianya terkilan dengan keputusan tersebut. Mahkamah ini adalah 'apex court' atau mahkamah tertinggi dalam hierarki bidang kuasa undang-undang di negara ini oleh itu keputusan-keputusan mahkamah ini bukan subjek kepada semakan selanjutnya (lihat perenggan 25–27, 31, 40).

(3) Permohonan ini untuk mahkamah ini menyemak semula keputusannya jelas satu penyalahgunaan proses mahkamah. Kaedah 137 Kaedah-Kaedah tidak boleh digunakan oleh mahkamah ini untuk menyemak semula atau mendengar semula dan menentukan ratuan-rayuan daripada keputusan yang diberi dalam rayuan yang telah diputuskan (lihat perenggan 28, 30–34, 39).]

**Notes**

For cases on Federal Court jurisdiction, see 2(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 4897–4906.

**Cases referred to**

*Badan Peguam Malaysia v Kerajaan Malaysia* [2009] 2 MLJ 161, FC (refd)
*Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, FC (refd)
*Fernandes v Ranganayakulu* AIR 1953 Mad 236 (folld)
*Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, HL (refd)
*Gan Boon Kye v Yap Hong Sin & Anor* [1997] 2 MLJ 598, CA (refd)
*Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, SC (refd)

A *Harbhajan Singh v Karam Singh* AIR 53 1966 SC 641 (refd)
*London Street Tramways Company Limited, The v The London City Council* [1898] AC 375, HL (folld)
*Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166, SC (refd)
B *Ong Thye Peng v Loo Choo Teng & Ors* [2009] 4 MLJ 472, FC (refd)
*Patten v Burke Publishing Co* [1991] 2 All ER 821, Ch D (refd)
*Venkata Narasimha Appa Row v The Court of Wards & Ors* (1886) 11 App Cas 660, HL (refd)

C **Legislation referred to**
Constitution of India [IND] art 137
Courts of Judicature Act 1964 ss 16, 17, 96
Federal Constitution art 121(2), (2)(a), (2)(c), 128, 128(c), 130, 139, 160(2)
Interpretation Acts 1948 and 1967 s 3
D Rules of the Federal Court 1995 rr 126, 137
Rules of the High Court 1980 O 19 r 7(1)

**Appeal from:** Civil Appeal No J–02–(IM)–1393 of 2010 (Court of Appeal, Putrajaya)

E *Ambiga Sreenevasan (T Shanmugaraj, Low Ee Thuan and Shireen Selvaratnam with her) (Ngae, Shan, Kalai & Co) for the applicant/plaintiff.*
*Harpal Singh Grewal (Ibrahim bin Hashim, Hassan Ibrahim, Harjinder Singh and Lubna Sheikh Ghazali with him) (Hassan Ibrahim & Co) for the respondent/second defendant.*

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**Mohd Ghazali FCJ:**

**[1]** The applicant is Panflex Sdn Bhd (the plaintiff in the originating action) and the respondent is Amalan Tepat Sdn Bhd (the second defendant in the originating action). The first defendant in the suit, Gymtech Development Sdn Bhd ('Gymtech') has since been wound up and is not a party to this application. We will refer to the parties in this application as they were in the originating action.

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**[2]** By way of motion dated 27 May 2011, the plaintiff moved this court for the following orders:

(a) that leave (if necessary) be given to enlarge time pursuant to r 126 of the Rules of the Federal Court 1995 ('the Rules') to file this application;

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(b) that pursuant to r 137 of the Rules leave be given to apply for a review of the decision of the Federal Court given on 19 April 2011 in this matter for the following purposes —

(i) to set aside the decision of this court given on 19 April 2011; and

(ii) to rehear the second defendant's appeal to this court vide notice of appeal dated 15 November 2010 before a differently constituted panel of this court; or

(iii) to restore and uphold the decision of the Court of Appeal dated 6 October 2010.

**[3]** This court had in a unanimous decision on 4 October 2011 dismissed the motion on the ground that r 137 of the Rules does not confer jurisdiction on this court to review its own decision. Rule 137 reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

THE BACKGROUND

**[4]** The facts surrounding the dispute leading to the filing of the action were as follows:

(a) Gymtech appointed the plaintiff to undertake certain construction works comprising condominiums, apartment blocks and a Club House ('the said works') pursuant to a construction contract dated 17 November 1997 for a total value of RM36,321,166.83;

(b) the said works were carried out on a piece of land belonging to the second defendant;

(c) at the end of the day, Gymtech owed the plaintiff the balance sum of RM4,874,939.52 ('outstanding sum') for the said works it carried out;

(d) pursuant to a supplementary agreement dated 11 August 2000 between all three parties, the second defendant agreed to partly settle the outstanding sum due to the plaintiff by selling to the plaintiff 14 condominium units at the total value of RM2,913,160;

(e) consequently fourteen sale and purchase agreements were entered into between the second defendant and the plaintiff; the purchase price of the said condominium units were set-off from the outstanding sum and were deemed paid in full by the plaintiff;

(f) the second defendant was obliged to redeem the said condominium units within two years from the date of the supplementary agreement;

(g) in breach of the supplementary agreement, the second defendant failed to settle the redemption sum for the said condominium units and these units could not be transferred to the plaintiff; and

(h) consequently, the supplementary agreement and the sale and purchase agreements were terminated and the plaintiff claimed from the second defendant a refund of the purchase price amounting to RM2,913,160.

**[5]** The above events led to the plaintiff filing the suit in the Muar High Court on 2 June 2006 against Gymtech for the balance of the outstanding sum amounting to RM1,961,779.51 (RM4,874,939.51 – RM2,913,160) and against the second defendant for a refund of the purchase price of RM2,913,160.

**[6]** The salient events which occurred after the suit was filed were as follows:

(a) on 20 July 2006, the second defendant entered appearance; it filed its statement of defence only on 18 October 2006;

(b) meanwhile, on 24 August 2006 the plaintiff filed an application (encl 10) to enter judgment in default of defence against the second defendant, praying for the following orders —

(i) a declaration that the supplementary agreement is cancelled or is validly terminated by the plaintiff;

(ii) the refund of the purchase price amounting to RM2,913,160;

(iii) in the alternative, general and special damages to be calculated and assessed after taking into account the said sum of RM2,913,160;

(iv) interest at 8%pa from the date of the supplementary agreement which is 11 August 2000; and

(v) costs;

(c) on 24 August 2007 the High Court allowed the plaintiff's application (encl 10) to enter judgment in default of defence against the second defendant;

(d) on 2 October 2009 the second defendant applied to set aside the judgment in default obtained by the plaintiff but the application (encl 51) was dismissed on 29 April 2010; and

(e) the second defendant appealed to the Court of Appeal against the dismissal of encl 51 but it was dismissed on 6 October 2010.

**[7]** On 4 November 2010 this court granted leave to the second defendant to appeal against the decision of the Court of Appeal in relation to the dismissal of encl 51 on the following issue:

> Whether an application for a declaratory judgment in default of defence pursuant to O 19 r 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for.

**[8]** On 19 April 2011, this court answered the question posed in the positive and allowed the appeal as a result of which the judgment in default was set aside and ordered the case be remitted to the Muar High Court for full trial.

**[9]** In delivering the judgment of this court, Richard Malanjum CJSS said:

> Before us one of the critical point raised by learned counsel for the appellant was that the main prayer sought for by the respondent was for a declaratory relief. As such default judgment should not be allowed unless supported by evidence and for the court to consider before it exercises its discretion.
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> For the respondent it was contended, inter alia, that the application to set aside the default judgment was made long after the 30 days period provided for under the RHC. Further it was submitted that there was no defence to the claim and the doctrine of res judicata applied. Learned counsel went on to say that in any event the default judgment could be severed to exclude the declaratory aspect of it.
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> With respect we are unable to agree with the submission of learned counsel for the respondent. As declaration was the main prayer of the respondent it is a rule of practice that before such relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayer without any evidence and argument advanced.

**[10]** The learned CJSS then referred to *Gan Boon Kye v Yap Hong Sin & Anor* [1997] 2 MLJ 598 and *Patten v Burke Publishing Co* [1991] 2 All ER 821. In *Gan Boo Kye*, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal said (at p 601):

> I have read the judgment of the learned judicial commissioner with great care, bearing in mind that this is not the case of an ordinary judgment in default but one of declaratory relief. As observed by *Zamir & Woolf on The Declaratory Judgment* (2nd Ed), at p 264:
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> … courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the court grants a declaration, it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief.

**[11]** The learned CJSS then concluded as follows:

> Reverting to the present case there is no dispute that the main relief in the impugned judgment is the declaration that the supplementary agreement entered between the respondent, the first defendant and the appellant has been validly cancelled and terminated by the respondent. It is also on record that the impugned judgment was granted upon the dismissal of the application (encl 14) for extension of time to file the defence by the appellant (see judgment of the Muar High Court dated 29 April 2010). In other words the impugned judgment is in fact a judgment in default of defence.

Meanwhile, there is nothing to indicate that discretion was exercised by the court when granting the declaratory relief as found in the impugned judgment.

We therefore find that the impugned judgment being declaratory in substance has not met the entrenched rule of practice applicable as exposited above for the granting of declaratory relief. Accordingly on this ground alone that we should allow this appeal.

However, there is another issue which is not directly within the ambit of the question posed. Nevertheless we should briefly address it. It is the sum which the appellant is required to pay under the impugned judgment. We are of the view that it is in fact a consequential order. As such if the declaratory relief in the impugned judgment is set aside then it has no basis to stand on.

Further, although the prayer refers to the refund of purchase price for 14 units of condominium, in fact it has to do with the construction works rendered by the respondent for the first defendant. In this case there was no proper assessment of the actual sum the respondent should be paid. Thus the sum ordered to be paid has not been justified. We therefore decline to accede to the suggestion that the impugned judgment can be severed so as to exclude the declaratory relief.

We are conscious of the alleged indolence on the part of the appellant in the conduct of this case. However, it is not a sufficient reason to ignore 'a practice of very long standing' on the grant of declaratory relief for judgment in default. Thus, despite the appellant succeeding in this appeal we made no order as to costs against the respondent.

Accordingly for the foregoing reasons we allowed the appeal and made the other Orders as we did. We find no reason to deal with the other points raised by learned counsel for the parties. Further, we do not think there is any injustice caused to the respondent since we have ordered for the case to go for full trial.

THE MOTION

**[12]** This motion was then filed by the plaintiff on 27 May 2011. The grounds highlighted in the application, which was titled 'Application to review under Rule 137' were as follows:

(a) there was a clear abuse of the court process by the second defendant by, inter alia, filing an application to set aside the judgment in default after exhausting its remedies of appealing against the same; and

(b) a gross injustice has been perpetrated upon the plaintiff by the second defendant as 4 years after obtaining the judgment in default and then defending various suits, applications and motions in the High Court, the Court of Appeal and the Federal Court, the matter has to now go back to the High Court for trial.

**[13]** The only issue before us was whether this court has the power to review its own judgment, ie, the judgment delivered by this court on 19 April 2011.

**[14]** The word 'review' in legal parlance connotes a judicial re-examination

of the case. According to the *Concise Oxford Dictionary* (9th Ed), the word 'review' means 'revision or reconsideration'; 'reconsider or revise'; 'view again'. In *Webster's New World Dictionary* (2nd Ed), the word 'review' means 'a looking at or looking over again'. In *Stroud's Judicial Dictionary of Words and Phrases* (7th Ed), (Vol 3: P-Z) the word 'review' is illustrated as follows:

> Where a decision is to be reviewed, the reviewing body will normally examine the lawfulness of the decision in question, as in the expression 'judicial review' or whether that decision is safe, or well-founded, as in the title of the Criminal Cases Review Commission (*Kataria v Essex Strategic Health Authority* [2004] 3 All ER 572 at 581, QBD per Stanley Burnton J. The judgment proceeds to distinguish between review and appeal).

**[15]** In *KJ Aiyer's Judicial Dictionary* (13th Ed), the word 'review' is illustrated as follows:

> According to the *Chamber's Twentieth Century Dictionary* the word 'review' is reconsideration and as a verb it means to see or examine again. According to the *Webster's Seventh New Collegiate Dictionary*, the word 'review' means renewed study of material previously studied (*Roshanlal Poddar v State* (1975) 79 Cal WN 816; 1975 CrLJ 1583).
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> The term 'review' means a judicial re-examination of the case in certain specified and prescribed circumstances (*Gopinath Deb v Budhia Swain* (1982) 54 Cut LT 515 (DB)).
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> Review is a statutory remedy for reconsidering the order due to error apparent on the face of the record or due to discovery of some new and important evidence or any sufficient cause ….

**[16]** In *Harbhajan Singh v Karam Singh* AIR 1966 SC 641, it was held that the court's power to review must be given by statute; Ramaswami J said (at p 642):

> In *Drew v Willis* 1891-1 QB 450, Lord Esher, MR pointed out that:
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> No court (and I would add 'no authority') has … a power of setting aside an order which has been properly made, unless it is given by statute.
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> In another case *Hession v Jones,* 1914-2 KB 421, Bankes J pointed out that the court, under the statute, has no power to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it and observed —
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> Then as to the inherent jurisdiction of the court. Before the Judicature Acts the courts of common law had no jurisdiction whatever to set aside an order which had been made. The Court of Chancery did exercise a certain limited power in this direction. All courts would have power to make a necessary correction if the order as

drawn up did not express the intention of the court; the Court of Chancery however went somewhat further than that, and would in a proper case recall any decree or order before it was passed and entered; but after it had been drawn up and perfected no court or judge had any power to interfere with it. This is clear from the judgment of Thesiger LJ in the case of *In re StNazaire Co* (1879) 12 Ch D 88.

The same principle was laid down by the Madras High Court in *Anantharaju Shetty v Appu Hegade* AIR 1919 Mad 244, in which Seshagiri Aiyar J observed:

It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by statute. Prima facie a party who has obtained a decision is entitled to keep it unassailed, unless the Legislature had indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least good reason for saying that such power should not be exercised unless the statute gives it, as for saying that another tribunal should not hear an appeal from the trial court unless such a power is given by statute.

**[17]** In *Trilok Singh v State Transport Authority, Bihar* AIR 1985 Patna 87, Ashwini Kumar Sinha J said (at p 88):

It is well settled that the power of review is not an inherent power but is created by statute and expressly conferred by the statute. The power of review has always been held to be a creature of statute.

**[18]** In *Fernandes v Ranganayakulu* AIR 1953 Mad 236, Ramaswami J said (at p 237):

So far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by statute. This is based upon the common sense principle that prima facie a party who has obtained a decision is entitled to keep it unassailed unless the legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. Therefore, the course of decisions in this country has been to the effect that a right to review is not an inherent power: …

**[19]** Under art 137 of the Constitution of India, the Supreme Court has been endowed with a comprehensive power to review its own judgment; art 137 reads as:

Review of judgments or orders by the Supreme Court

Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

**[20]** In Malaysia, we do not have such a provision in our Federal Constitution ('the Constitution'). art 121(2) of the Constitution provides that this court shall have the following jurisdiction, namely:

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.

We will also refer to arts 128 and 139 just for completeness. Article 128 of the Constitution provides that this court shall have jurisdiction to determine 'any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws' and 'disputes on any other question between States or between the Federation and any State'. Article 128 also provides that this court shall have jurisdiction to determine a question as to the effect of any provision of the Constitution which arise in any proceedings before another court and remit the case to that court to be disposed of in accordance with the determination. Article 128(3) reads:

> The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

Article 130 of the Constitution provides that the Yang di-Pertuan Agong may refer to this court for its opinion any question as to the effect of any provision of the Constitution which have arisen or appears to him likely to arise, and this court shall pronounce in open court its opinion on the question so referred to it.

**[21]** Thus, this court has jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof ( art 121(2)(a)) and 'such other jurisdiction as may be conferred by or under *federal law*' ( art 121(2)(c)) and that jurisdiction to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by *federal law* (art 128(3)). (Emphasis added.)

**[22]** Article 160(2) of the Constitution provides 'federal law' means:

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

(b) any Act of Parliament.

**[23]** Section 3 of the Interpretation Acts 1948 and 1967 (Act 388) provides that an 'Act' or 'Act of Parliament' used with reference to legislation means a law made by Parliament and that the words 'federal law' means 'an Act of Parliament, and any other law in force in Malaysia or any part thereof which relates to a matter with respect to which Parliament has power to make laws'.

**[24]** The Courts of Judicature Act 1964 ('CJA') is federal law. With regards to the jurisdiction of this court in civil appeals, s 96 of the CJA reads:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
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> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
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> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

**[25]** In the instant application, the plaintiff (the applicant) moved this court for an order, pursuant to r 137 of the Rules, that leave be given to apply for a review of the judgment of this court dated 19 April 2011, discussed earlier, for the purposes of setting it aside so that the appeal can be reheard before a differently constituted panel of this court. Can this court review or rehear this appeal? Our answer would be this court has no such power to review or to rehear the appeal which was decided by this court on 19 April 2011. Neither the Constitution nor the CJA confer this court the power of review over its own decision. In chapter 29 of *NS Bindra's Interpretation of Statutes* (9th Ed), with regards to interpreting a Constitution, the learned author said (at pp 1182–1184):

> The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instruments. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. If the plain meaning of an uncontradicted constitutional provision is to be disregarded, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If then it is found that to give a particular meaning to a word of

indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected. This gives rise to the universally recognised incontrovertibly established rule for construction that it is presumed that words appearing in a Constitution have been used, according to their plain, natural and usual signification and import. *The words of the Constitution, however, are to be taken in natural and obvious sense, and not in a sense invariably restrained or enlarged. The courts are not at liberty to disregard the plain meaning of the words of a Constitution in order to search for some other conjectured intent.* A word which has been plainly used in a limited sense in the article of the Constitution relating to the legislative and executive departments, must be understood as retaining the same sense when employed in an article relating to the judicial department. (Emphasis added.)

**[26]** In our country, the executive is vested with the power to make policy decisions and implement laws and the Legislature is empowered to issue enactments. The judiciary is responsible for adjudicating disputes. In chapter 8 of *NS Bindra's Interpretation of Statutes*, the learned author said (at p 395):

If the language of a statute is clear and unambiguous, the court must give effect to it and it has no right to extend its operation in order to carry out the real or supposed intention of the legislature. Such language best declares, without more, the intention of the law-giver and is decisive of it. When the language is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise. The duty of court of law is simply to take the statute as it stands, and to construe its words according to their natural significance. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. It is an elementary principle of the construction of statutes that the words have to be read in their literal sense. Thus, generally speaking, words and expressions would be given their plain and ordinary meaning which cannot be cut down or curtailed unless they in themselves are clearly restrictive. If the words of the statute are clear and unambiguous, it is the plainest duty of the court to give effect to the natural meaning of the words used in provisions. The courts are enjoined to take the words as used by the legislature and to give them the meaning which naturally implies.

**[27]** The Constitution provides that this court shall have jurisdiction to determine appeals from the decisions of the Court of Appeal. Section 96 of the CJA provides an appeal shall lie from the Court of Appeal to this court with the leave of this court. There is no provision either in the Constitution or the CJA which confer this court the power of review over its own decision. Thus, taking the words of the Constitution and the CJA in its 'natural and obvious sense, and not in a sense invariably restrained or enlarged', we dare say this court is 'not at liberty to disregard the plain meaning of the words' of the Constitution or the CJA 'in order to search for some other conjectured intent', eg, the power to review, re-examine, reconsider or rehear an appeal it has already heard and

disposed of. No such substantive power has been granted to this court by the Constitution or the CJA. This court must not do anything unconstitutional.

**[28]** In the instant application the applicant moved this court to review the decision given on 19 April 2011 for the purpose of setting the decision aside and consequently rehear the appeal, and, before a differently constituted panel of this court at that. This application is clearly an instance of an abuse of process of the court following dicta in the judgment of Eusoffe Abdoolcader FJ (as he then was) in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 where the learned judge said (at p 271):

> … This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 528, 542 which was applied by this court in *Tractors Malaysia Bhd v Charles Au Yong* [1982] 1 MLJ 320, 321.

**[29]** In *The London Street Tramways Company Limited v The London City Council* [1898] AC 375, the House of Lords held that a decision of the house upon a question of law is conclusive and binds the house in subsequent cases and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of the house. We are of the same view as far as this court is concerned. In his judgment, Earl of Halsbury LC said (at pp 380–381):

> My Lords, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an 'extraordinary case,' an 'unusual case,' a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience — the disastrous inconvenience - of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, 'interest rei publicae' that there should be 'finis litium' at some time, and there could be no 'finis litium' if it were possible to suggest in each case that it might be reargued, because it is 'not an ordinary case,' whatever that may mean. Under these circumstances I am of opinion that we ought not to allow this question to be reargued.

**[30]** We would agree with the views of Eusoffe Abdoolcader FJ in *Dato Mokhtar bin Hashim & Anor* that permitting a party to reopen a concluded judgment of this court is an abuse of process of the law and would have far

reaching adverse impact on the administration of justice. In *NS Bindra's Interpretation of Statutes*, the learned author said (at p 397):

> It is elementary that the primary duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention. A statute must be constructed in a manner which carries out the intention of the legislature. The intention of the legislature must be gathered from the words of the statute itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be obtained by it. When the language of the law admits of no ambiguity and is very clear, it is not open to the courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law.

**[31]** The judiciary is responsible for adjudicating disputes. The courts cannot create powers or rights where none exists. The instant application is a motion assailing the correctness of a decision of this court on merits or claiming reconsideration and is clearly not maintainable. The Constitution and the CJA does not provide the substantive power of review and hence this court cannot sit as a court of appeal from its own decisions, nor can it entertain applications to review on the ground that one of the parties in the case conceives himself to be aggrieved by the decision.

**[32]** The instant application was made pursuant to r 137 of the Rules. Can r 137 be utilised to make such an application? We would answer this question in the negative. In *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 at p 168, Abdul Hamid Omar CJ (Malaya) (as he then was) said:

> There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.
>
> Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by s 42, in particular sub-s (3) of s 42. The other exception is as provided under s 44 sub-s (3) to the effect that every order such as that envisaged in sub-s (1) of s 44 may be discharged or varied by the full court.

**[33]** Abdoolcader SCJ (as he then was) in his dissenting judgment in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 said (at p 46):

> To reverse that decision of the Supreme Court on locus standi now would amount to no less than our sitting in judgment on another division of this court and overruling its adjudication given only some four and a half months ago. The Supreme court which can aptly be described and designated as the engine room of

A the Constitution would as a result have the sanctity of its decision set at stake. In *Lye Thai Sang & Another v Faber Merlin (M) Sdn Bhd & Others (* [1986] 1 MLJ 166) this court held, in a judgment delivered by Tan Sri Abdul Hamid CJ (Malaya), that where an appeal has been heard and disposed of by the Supreme Court, the court has no power to review the case, that is, to re-open, rehear and re-examine its decision for whatever purpose. It now becomes a matter of speculation whether that decision itself has been the subject of review by this court as a result of the decision of the majority of this bench in the instant appeals. I must point out that only a constitution amendment can confer jurisdiction and effectuate the power of review by the Supreme Court of its own decision.

**[34]** In *Ong Thye Peng v Loo Choo Teng & Ors* [2009] 4 MLJ 472, the respondents moved this court to have its earlier decision in the same case reviewed and reheard pursuant to r 137. The application was dismissed. In delivering the judgment of the court, Zulkefli FCJ (as he then was) said (at p 479):

SCOPE OF RULE 137

[6] It must be noted at the outset that r 137 of the RFC does not actually confer jurisdiction on the Federal Court to hear any application or to make any order to prevent injustice or abuse of the process of the court. Rule 137 cannot be construed as conferring upon the Federal Court unlimited power to review its earlier decision for whatever purpose. The court only has the limited 'inherent power or 'inherent jurisdiction' in order to maintain its character as a court of justice …

**[35]** It is unclear whether the words 'limited 'inherent power or 'inherent jurisdiction' in order to maintain its character as a court of justice' appearing in the judgment above denote that this court has the inherent power to review an earlier decision as the meaning of those words were not enlightened in the judgment above. Be that as it may, the learned judge then went on to say as follows (at p 483):

… It is our considered view to relitigate a case which has been heard and disposed of by this apex court is therefore not one of the circumstances envisaged by r 137 for this court (the Federal Court) to entertain.

**[36]** From our reading, the judgment above denotes that r 137 of the Rules cannot be utilised to relitigate, in other words, to review or rehear and determine appeals from a decision of this court given in an appeal that this court has already heard and disposed of, as in the instant application.

**[37]** In *Badan Peguam Malaysia v Kerajaan Malaysia* [2009] 2 MLJ 161, Zaki Azmi CJ (as he then was), in relation to finality of judgments delivered by this court, said (at p 175):

[27] And in the context of this case, even if we disagree with the earlier panel on the interpretation of the relevant articles of the Federal Constitution, that does not warrant us to set aside the judgment for otherwise there is no end of the proceedings.

**[38]** The aforesaid view would be in line with what was said by Lord Watson in *Venkata Narasimha Appa Row v The Court of Wards & Ors* (1886) 11 App Cas 660. At p 664, Lord Watson in delivering the judgment of the House of Lords said:

> There is a salutary maxim which ought to be observed by all courts of last resort — interest republicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

**[39]** Section 16 of the CJA provide that rules of court may be made for, inter alia, the following purposes:

> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, the Court of Appeal and the Federal Court in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court to the Court of Appeal or to the Federal Court shall be made;
>
> (b) for regulating and prescribing the procedure on civil or criminal appeals from any court or person to a High Court, the Court of Appeal or the Federal Court;
>
> …
>
> (p) for any purpose for which rules of court may be made under any written law.

**[40]** Section 17 of the CJA reads:

> (1) Rules of court under section 16 may be made by a Rules Committee appointed as hereinafter provided.
>
> …
>
> (4) Rules of court shall be published in the Gazette, and shall come into force on the date of publication or on such date as may be specified therein.
>
> (5) Rules of court shall be laid before the Dewan Rakyat at the first meeting after their publication, and may be disapproved in whole or in part by a resolution of the Dewan Rakyat.

**[41]** Section 3 of the Interpretation Acts 1948 and 1967 provide that 'rules of court' means 'rules or other subsidiary legislation regulating the practice and procedure of a court or courts'.

**[42]** From our reading of the aforesaid provisions of the CJA and s 3 of the Interpretation Acts, we are of the view that the Rules Committee cannot confer any power of review by this court of its own decision. Unlike Parliament, the Rules Committee cannot legislate and confer powers on this court or even extend its jurisdiction. 'Only a constitution amendment can confer jurisdiction and effectuate the power of review by the Supreme Court of its own decision' (per Abdoolcader SCJ in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 46). That being the position, r 137 of the Rules cannot be utilised by this court to hear and determine appeals from a decision given in an appeal it has already disposed of.

**[43]** This court is the highest court within the hierarchy of the legal jurisdiction in this country. This court has been described as 'the court of last resort' or the 'apex court' after the right of appeal to the Privy Council was abolished. Thus, decisions of this court are not subject to further review. In the instant application, the plaintiff is challenging the validity of the order and judgment passed by this court on 29 April 2011. We had dismissed the application.

**[44]** As long as this court is reconsidering its earlier final judgment, it amounts to review. There are no two ways about it. We are also of the view that inherent powers of this court do not confer or constitute a source of jurisdiction. We would reiterate that this court must not do anything unconstitutional. The power to review is a substantive power. No such substantive power has been granted to this court by the Legislature. The Constitution and the CJA does not provide the substantive power of review and hence this court cannot sit as a court of appeal from its own decisions, nor can it entertain applications to review on the ground that one of the parties in the case conceives himself to be aggrieved by the decision. Opening doors for a further appeal would be opening the floodgates and cause more uncertainty in the law. It would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard. In *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996 Lord Wilberforce observed:

> … Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearances of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected.

**[45]** For the aforesaid reasons this application was dismissed with costs. After hearing counsel for the parties, we ordered that the plaintiff (applicant) pay costs to the second defendant (the respondent) the sum of RM30,000. We also ordered that the deposit be remitted to the second defendant towards costs.

*Application dismissed with costs fixed at RM30,000.*

Reported by Kohila Nesan